NO. 88-1267

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1988

ROBERT (BOB) ODOM,
AND GILBERT LYONS, ET AL
Petitioner

VERSUS

D. A. DELAHOUSSAYE, ET AL
Respondent

On Petition for a Writ of Certiorari
to
The United States Court of Appeals
For the Fifth Circuit

PETITION FOR CERTIORARI

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83 pp

QUESTIONS PRESENTED

I. Are prevailing defendant government officials in civil rights cases denied due process when the courts refuse to give them opportunity to prove plaintiff's case was knowingly frivolous by denying them an opportunity to present evidence of the crucial issue, that the plaintiff's suit was knowingly unreasonable on the merits?

II. Are prevailing defendants unfairly denied attorney's fees in civil rights cases when the court judges the basis for the suit on the extent of consideration given the case by the trial judge and length of his opinion if this itself was protracted by the court's error in failing to grant a prompt dismissal and in having made an indisputedly erroneous factual assumption?

LIST OF PARTIES

In accordance with Rule 21(B) the following is a list of all parties in the court whose judgment is sought to be reviewed:

Relators:

Robert (Bob) Odom
Gilbert Lyons
Manning J. Broussanrd
William Boudreaux

Attorneys:

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Charles Boudreaux
F. Jefferson Millican

Respondents:

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Louisiana Rice Properties, Inc.
Southwest Louisiana Grain, Inc.
Rice Capital Sales, Inc.
Del Rico, Inc.

Attorneys:

Louis M. Phillips
Brett P. Furr
Taylor, Porter, Brooks & Phillips

Not now seeking review:

Richard Seale
Homer "Ed" Barousse

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RESPONDENT

On Petition for a Writ of Certiorari to
The United States Court of Appeals
For the Fifth Circuit

PETITION FOR CERTIORARI

MAY IT PLEASE THE COURT:

Petitioners, Robert (Bob) Odom, Gilbert Lyons, William Boudreaux and Pete Broussard pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on October 4, 1988, rehearing denied October 31, 1988.

CITATIONS TO OPINIONS BELOW

The original opinion of the United States District Court for the Western District of Louisiana is found in the Appendix hereto and is reported at 605 F.Supp 1525 (1985) and the appeal to the United States Court of Appeals for the Fifth Circuit is found in the appendix hereto and reported at 788 F.2d 1091. The ruling of the United States Magistrate, the United States District Court for the Western District and the United States Court of Appeal for the Fifth Circuit on the motion for attorney's fees are unpublished but found in the appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on October 4, 1988 and rehearing was denied October 31, 1988.

The jurisdiction of this Court is invoked under 28 U.S.C. 1252 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

42 USC 1983 - Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 USC 1988 - The jurisdiction in the civil and criminal matters conferred on the district courts by the provisions of

this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said court in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this Title, Title IX of Public Law 92-318, or Title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

STATEMENT OF THE CASE

In late 1981 it came to the attention of the Louisiana Department of Agriculture and the State Warehouse Commission that agricultural warehouses and grain dealers in Louisiana and throughout the nation were experiencing difficult times and many were failing. The failure of warehouses and grain elevators grew, and the concern in the state and throughout the nation heightened.

In order to meet the emerging crisis of failing warehouses and grain dealers the Louisiana Department of Agriculture and State Warehouse Commission assembled three teams to examine the finances of every warehouse and grain dealer licensed in the state. The team that examined the facility called Southwest Louisiana Grain Inc. (hereinafter Southwest Grain) determined that this facility was insolvent, as it was indebted unto area farmers for approximately $1,000,000.00, and that it was unable to satisfy these obligations.

Southwest Grain along with Louisiana Rice Properties, Inc. (hereinafter Louisiana Rice) were each licensed by the State Warehouse Commission and the Louisiana Department

of Agriculture. Louisiana Rice held a warehouse license and Southwest Grain held a grain dealers license. Louisiana Rice was authorized to store grain, issue warehouse receipts and conduct banking with the receipts while Southwest Grain bought grain for resale. It was known that at this time some warehouses and grain dealers were issuing receipts on grain that did not exist and selling grain they did not own to cover losses caused by speculation with commodities.

The two corporations Southwest Grain and Louisiana Rice which jointly operated the failed facility, were family owned and operated and substantially interconnected operationally and financially with all persons who performed duties at Southwest Grain being actually on the payroll of Louisiana Rice.

Efforts by defendant Odom, Commissioner of Agriculture, and his staff to work with D. A. Delahoussaye, President, Chairman of the Board and majority shareholder of both corporations to prevent collapse of the company were fruitless and as of March 26, 1982 the facility still owed over $500,000.00 to area farmers. The Warehouse Commission on this date voted unanimously to recommend temporary

suspension of the license of Louisiana Properties for 10 days, placement of the facility under the supervision of the Warehouse Commission and scheduled a hearing for Louisiana Rice to show cause as to why the license should not be revoked all as provided by law.

Commission Odom, who had discretion whether or not to implement the recommendation. prepared a letter to inform Louisiana Rice and Mr. Delahoussaye of a temporary suspension and to place the operation under the direction and supervision of the Commission as provided for in Louisiana law. However, this letter was not delivered nor was the recommendation ever implemented.

Instead an agreement was reached between Odom and Delahoussaye that Southwest Grain, which had already been voluntarily closed, would remain closed but Louisiana Rice would continue operations and operate with informal supervision by the Warehouse Commission and that the hearing which had been set would be set aside indefinitely. Consequently, at no time did defendants close any of plaintiffs' corporations or their facilities nor were any placed under formal supervision and direction of the State

Warehouse Commission.

However, one year later, on or about March 23, 1983, plaintiffs, D.A. Delahoussaye, Louisiana Rice Properties Inc., Rice Capital Sales, Inc., and Del Rico, Inc. brought an action for business losses against the Commissioner of Agriculture and the members of the Warehouse Commission purportedly alleging a claim under 42 U.S.C. 1983 and invoking pendent jurisdiction in tort for publicity that emanated from the Warehouse Commission meetings. All defendants filed Motions to Dismiss which were denied without hearing. All defendants filed Motions for Summary Judgment which were denied without hearing.

All defendants herein filed Motions to Reconsider the Motions for Summary Judgment based on the undisputed facts that:

1. To the extent that defendants acted, they did so under authority of a constitutionally valid statute, particularly, LSA-R.S. 54:257, and State Warehouse Commission Regulation Number 3;

2. However lawful, the decision of the Warehouse Commission was nevertheless not implemented;

3. To the extent that anything was done following the recommendation of the Warehouse Commission, it was done by and with the full agreement of the licensee;

4. The defendants played no role in the publicity for which the plaintiffs complained; and

5. Even if adverse publicity resulted in damage to the reputation of the plaintiff, D.A. Delahoussaye, which damage the defendants deny, the damage cannot be connected to a constitutionally guaranteed right, and no action lies under Section 1983 for damage to one's reputation;

6. An audit of plaintiffs was performed by defendants to identify each and every customer that ceased or reduced business dealings with the plaintiffs during the relevant period and their depositions were taken. Not one customer ceased doing business or reduced business with plaintiffs as a result of any actions of the defendants and each customer prescribed other definable reasons. Thus, not only did the actions complained of by defendants not occur defendants proved that plaintiffs' damages came from reasons unrelated to defendants. Yet even then plaintiffs still refused to withdraw their suit, further demonstrating it as a suit based on animosity and reprisal as opposed to reason.

Over two years after suit was filed and after it had been set for trial on the merits on two occasions, the Honorable John M. Shaw of the United States District Court for the Western District of Louisiana granted on reconsideration all defendants' Motions for Summary Judgment, 605 F.Supp. 1525 (1985). The United States Court of Appeals for the Fifth Circuit affirmed that decision (although on other grounds) on or about May 2, 1986 788 F.2d 1091 (5th Cir. 1986).

Defendants, as prevailing parties, filed a Motion for Attorney's Fees under 42 U.S.C. 1988. The United States

Magistrate, by finding that the plaintiffs' claims had arguable merit at the time the complaint was filed, ordered that defendants' Motion for Attorney's Fees be denied.

This order of the United States Magistrate was appealed to the District Judge. Thereafter, in affirming the Magistrate's denial of defendants' Motion for Attorney's Fees the District Court declared:

> Defendants have not demonstrated that plaintiffs' claims were frivolous at the time the claims were filed. Moreover, defendants have not shown the court why the Magistrate's order is clearly erroneous.

An appeal was perfected to the United States Court of Appeals for the Fifth Circuit and the District Court's order denying an award of attorney's fees was affirmed on the summary calendar, No. 87-4941, on October 4, 1988. Thereafter, on October 31, 1988 the petition for rehearing was denied.

ARGUMENT

I. There cannot be a valid determination whether plaintiff's suit was frivolous and unreasonable in a civil rights suit where a basic inquiry is not made on the questions of whether plaintiff knew or should have known there was no deprivation.

II. The "record size" test utilized by the court to determine if plaintiff's case was frivolous and unreasonable is arbitrary and unreliable especially where the trial court commits error in its adjudication of the case and extends litigation which should have promptly been dismissed.

III. The court denied defendants a due process hearing on the question of attorney's fees by proceeding on an indisputably invalid assumption that there was a deprivation of property right.

I.

There cannot be a valid determination whether plaintiffs' suit was frivolous and unreasonable in a civil rights suit where a basic inquiry is not made on the question of whether plaintiff knew or should have known there was no deprivation.

It must be remembered that this suit arose when plaintiffs brought action against the defendant under 42 USC 1983 alleging that they had acted under color of state law as members of the Warehouse Commission and a Commissioner of Agriculture to deprive and violate plaintiffs' constitutionally protected right to operate one's business pursuant to state license. The district judge sustained defendants' Motion for Summary Judgment, 605 F.Supp. 1525 (W.D. La. 1985) after initially denying the Motions for Summary Judgment and Motions to Dismiss. The granting of the motion for Summary Judgment was affirmed on appeal. 788 F.2d 1091 (5th Cir. 1986). The defendant then filed a motion in the district court for attorney's fees under 42 USC 1988 and the denial thereof forms the basis of this application for writs.

With reliance upon Christianburg Garment Co. v. EEOC, 434 U.S. 412, 98 S.Ct. 694, 54 L.Ed 2d 648 (1978), the lower

courts have concluded that prevailing defendants in a civil rights action may receive attorney's fees only "if the action is without foundation, frivolous or unreasonable, even though not brought in subjective bad faith." In setting this standard the court recognized while Congress wanted to clear the way for suits to be brought by wronged plaintiffs as an instrument to vindicate a policy of highest priority, it also wanted to protect defendants from burdensome litigation having no legal or factual basis or brought in subjective bad faith.

To determine if plaintiffs' claims were devoid of arguable merit or factual support so as to be frivolous the lower courts have weighed the consideration that was given to the case, the length of the court's opinion and the arguable merit of plaintiffs' contentions.

It is respectfully submitted that defendants have never been given a hearing and, therefore, the opportunity to prove that plaintiffs case lacked legal and factual merit and that it was brought in subjective bad faith inasmuch as the courts have simply looked at the size of the record. This fails to render due process to defendants to protect themselves from burdensome litigation having no legal or factual basis or

brought in bad faith as intended by Congress. Defendants have been denied a hearing to establish that a colorable claim never existed and that the plaintiffs knew or should have known so. The standard used by the courts of looking at the size of the record on the motion for summary judgment is a false, incomplete and inaccurate measure.

If the only objective guideline the courts refer to in a 1983 action to determine the defendants' right to attorney's fees is the weight of consideration given the case and the length of the court's opinion, it is readily apparent that defendants can be denied attorney's fees in a case even where plaintiffs deliberately intend to harass the defendant on a claim without foundation. For example, a plaintiff can allege denial of due process for inadequate postdeprivation proceedings, force defendants into extensive litigation and have a large record evolve on the issue of due process of the postdeprivation proceedings even though there was never actually a deprivation. Therefore, as in the case at bar, the defendant officials will be denied attorney's fees and plaintiffs become immune from such assessment despite the meritless claim of deprivation simply because the record is

large and the court entertained one issue in extended litigation by error. This approach clearly defeats the very purpose intended by Congress to protect defendants against burdensome litigation.

It would appear this problem was in part recognized by Justice Rehnquist in his dissent in Hughes v. Rowe, 449 U.S. 5, 101 S.Ct. 173, 66 L.2d 163 (1980) wherein the majority reversed an award of attorney's fees to the defendants. The majority noted that even those allegations of the plaintiff inmate that were properly dismissed for failure to state a claim deserved and received the careful consideration of both the District Court and Court of Appeals. Justice Rehnquist observed, "The fact that the District court carefully examined petitioner's complaint for any possible claim before dismissing it is hardly evidence that a colorable claim must exist. Quite the contrary, it is a strong indication that no claim could be found no matter how deeply the District Court probed." Additionally, Justice Rehnquist stated as follows:

> This is not a case, such as was suggested in Christianburg, supra, at 422, 98 S.Ct. at 700, where the claim appeared meritorious at the outset and only later was refuted by facts which emerged on discovery or at trial. The decisive facts were not merely "questionable" or

"unfavorable" as the Court suggests, ante, at 178, they were dispositive.

Such is the case here and, what is even worse is that the court did not carefully examine plaintiffs' complaint. Instead it appears the court has equated a large record with careful examination. Herein the court apparently assumed that since the record was large and that the court had entertained the plaintiffs' case for a protracted time, that the case must have had arguable merit. Such a conclusion on the part of the court denies the defendants the proper test of determining whether the plaintiffs knew there was no basis for their claim, that is, they were in subjective bad faith.

Defendants take the position that it was and is apparent to all that there was never a deprivation for as observed by the Court of Appeals for the Fifth Circuit, plaintiffs reached an agreement with the Commission to continue in operation under the Commission's supervision. The plaintiffs further agreed to keep Southwest Grain closed as had already been voluntarily done. There was never a deprivation as there was never any action taken and there was always an agreement by plaintiffs with the defendants. Therefore, this was not a case where the facts only emerged on discovery but a situation

about which plaintiffs were fully aware and participated in.

However, more importantly, it is submitted that the fact that the courts entertained petitioners' complaint by considering one issue and thereby creating a large record, is not evidence that a colorable claim ever existed under a 1983 action and defendants have been repeatedly denied the right to prove this and their corresponding right to attorney's fees. It must be concluded that without the opportunity to prove the elements entitling defendants to attorney's fees the denial of attorney's fees was clearly arbitrary.

Defendants maintain that plaintiffs were at all times aware that there was no loss sustained to them as a result of actions on the part of defendants, and it is incomprehensible how it could ever be validly determined whether a case had arguable merit if defendants are not allowed to produce evidence to establish there was never a deprivation to plaintiffs by the defendants and that plaintiffs knew this.

Defendants urgently submit the extensive consideration given the case by the lower courts on the motion for summary judgment cannot be dispositive on the question of whether plaintiffs' claim was frivolous or in bad faith.

The application of the test being utilized by the courts can protect a plaintiff who files a frivolous or even malicious 1983 action because the test denies the defendants access to the court with proof the complaint was in bad faith. This is especially so where, as in the instant case, the complaint is dismissed before a trial on the merits. Clearly a bad faith plaintiff should not be shielded from payment of attorney's fees that Congress intended a Harassed defendant would receive.

II.

The record size test utilized by the court to determine if plaintiff's case was frivolous and unreasonable is arbitrary and unreliable, especially where the trial court commits error in its adjudication of the case and extends litigation which should have promptly been dismissed.

The granting of the motion for summary judgment was affirmed by the Court of Appeals for the Fifth Circuit, 788 F.2d 1091, but on other grounds than that rendered by the district court having recognized that the district court erred in its reasoning. It is submitted that it was the errors of the district judge that created an extensive record and propelled defendants into burdensome litigation.

There is an obvious inequity when defendants are denied attorney's fees because by court error the suit was not promptly dismissed and a large record developed through no fault of defendant and in a case that had no basis in law or fact.

Defendants from the outset informed the court that there had never been a deprivation. However, defendants were forced to file extensive pleadings and memoranda to have the district judge reconsider his denial of the motion for summary judgment and the reconsideration and granting of

the motion for summary judgment only took place after extensive discovery involving over forty depositions, and on the eve of trial when final preparation was completed.

If Congress intended to protect defendants from burdensome litigation, the standard utilized by the court of looking at the consideration given to the case by the court, the length of the court's opinion and arguable merit of plaintiffs' contentions appears totally inappropriate in a case where the court's lengthy opinion is based upon an incorrect legal conclusion and held on appeal to be erroneous. It is especially inappropriate in a case that should have been promptly dismissed and yet never went to trial where the merits may be examined.

Not only has the court utilized an ineffective and unreliable test to determine if a suit was frivolous but by its own erroneous action it has prevented any fair result from occurring with such a test by ignoring the pronouncement of this Court and failing to dismiss the suit or even entertaining a hearing on the motion to dismiss based upon the holding of Harlow v. Fitzgerald, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed 2d 391 (1982). Defendant urged that plaintiffs' case should

have been promptly dismissed inasmuch as government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which reasonable persons would not have known.

Defendants here have persistently contended that the complaint lacked arguable merit and the failure of the court to promptly recognize this should not penalize the defendants who have suffered through protracted litigation because of court error and now being denied attorney's fees because of this same error.

III.

The court denied defendants a due process hearing on the question of attorney's fees by proceeding on an indisputably invalid assumption that there was a deprivation of a property right.

It is absolutely necessary to recognize that the Magistrate was clearly in error in concluding that the district court had found plaintiffs were deprived of a protected and liberty interest and the district court and Court of Appeal erred in failing to find this manifestly erroneous. The reviewing courts' failure to recognize this error is devastating to defendant's position that the plaintiffs' complaint was without foundation and that they continued to litigate after this was made even more evident following discovery. Accordingly, defendants should properly be awarded attorney's fees.

A perusal of the district court's ruling on the motion for summary judgment demonstrates that the court found it was faced with a dual inquiry, making the following observation:

> Accordingly, whether plaintiffs have alleged a recognizable violation of their fourteenth amendment right to procedural due process involves a dual inquiry; were they deprived of a protected interest, and if so, was the deprivation accomplished without adherence to due process

standards? Findeisen v. North East Independent School District, 749 F.2d 234, 237 (5th Cir. 1984).

Most important to observe is that the Court then declared:

> There is a question of fact as to whether plaintiffs were actually deprived of this property interest, since the three companies were apparently allowed to continue operations. * * *(F) or the purpose of this ruling the court will assume that plaintiffs were actually deprived of the property interest alleged.

Thereafter, in regard to the allegation of injury to their business reputation, the district court additionally declared:

> The court will once again assume that the plaintiffs did suffer the reputational injury alleged from the defendants' communications for the purpose of this motion.

It is of unquestionable significance that the lower courts have failed systematically to determine the merits of the allegations by plaintiffs that they were deprived of a protected interest and suffered compensable damage. If the courts had looked into the question of a deprivation of a right to the plaintiffs by the defendants it would have been readily ascertained that such never existed and that plaintiff knew so. However, it is defendants' position that this erroneous assumption which was made to permit the court to discuss the

question of procedural due process was later erroneously utilized as though it was finding of fact, and, then became the reasoning upon which the defendants were denied attorney's fees.

This district judge on appeal of the motion for attorney's fees maintained he is mandated to set aside any portion of the Magistrate's order found to be clearly erroneous but it is respectfully submitted he erred in failing to recognize that the Magistrate's error of elevating an assumption to a finding of fact constitutes manifest error. Further, concluding that it had not been demonstrated that the plaintiffs' claims were frivolous despite defendants' constant urging that plaintiffs had never been deprived or injured by them is also manifest error.

Thereafter, the Court of Appeals for the Fifth Circuit perpetuated this error by holding that the factual determinations of the magistrate were correctly found by the district court to be not clearly erroneous and then stating, "Defendants have failed to demonstrate that the factual question of injury was baseless at the time the complaint was filed."

This completely overlooks defendants main argument - they have never been given the opportunity to prove (demonstrate) that the factual question of injury was baseless inasmuch as the lower court, as shown hereinabove, had made an assumption on that question and the magistrate erroneously concluded that the district had found this as a fact.

There has never been an adjudication as to whether there was an injury by deprivation caused by defendant officials, and, despite defendants' urging they have been denied access to the court to establish that the claim of deprivation was baseless. Defendants have never been given an opportunity throughout all this litigation to appear before the district judge or the Magistrate in open court to present evidence to establish their contention.

The failure to be accorded a hearing and the perpetuation of the error of raising an assumption to the status of a finding of fact was then continued by the Court of Appeal by holding, "We deny defendants' request to remand for further proceedings on the factual foundation of this case in which a grant of summary judgment has been affirmed by

this court."

The rulings below clearly deprives defendants of their opportunity to establish the right intended by Congress to allow prevailing defendant attorney's fees when plaintiffs' complaint has no factual or legal basis.

CONCLUSION

Inasmuch as plaintiffs' suit was an action under 42 USC 1983 there could be no merit to the complaint if the action complained of by plaintiffs did not occur and therefore plaintiffs were not deprived of anything much less a federally protected right. Despite the fact that an adjudication has never been made on the question of whether there was a deprivation, the lower courts have assumed a deprivation and by fiction have determined that plaintiffs' suit was not without foundation. The courts' conclusion that the suit was not frivolous was judged on the size of the record in the case. This is a patently inaccurate measure in any case but especially so when the litigation is protracted by court error in having failed to promptly recognize the lack of merit in plaintiffs' suit and having failed to dismiss same early on.

The courts routinely grant hearings before setting the amounts of attorney's fees. To fail to do so would clearly be a deprivation. Yet the courts routinely deny defendants hearings, as here, to prove their right to fees. Is this denial not clearly thwarting the intent of Congress and thusly evolving into a systematic denial of due process to successful

defendants.

Petitioners pray that this Honorable Court grant this writ in order to evaluate the test and procedures the lower courts are utilizing to determine a prevailing defendant's right to attorney'es fees in 1983 actions.

In the alternative, it is prayed that this Honorable Court grant this writ and order a remand to allow defendants a hearing to establish whether plaintiffs knew or should have known that they never suffered any deprivation.

Respectfully submitted,

C. JAMES GELPI, P.C.

C. James Gelpi
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that three copies of the foregoing PETITION FOR WRIT OF CERTIORARI have been mailed, postage prepaid, to the following: Charles Boudreaux, Sr., P.O. Drawer 3118, Lafayette, Louisiana 70502, F. Jefferson Millican, P.O. Drawer 1225, Jennings, Louisiana 70546, Louis M. Phillips, of Taylor, Porter, Brooks & Phillips, P.O. Box 2471, Baton Rouge, Louisiana 70821, Brett P. Furr, P.O. Box 2471, Baton Rouge, Louisiana 70821.

I further certify that all parties required to be served have been served.

New Orleans, Louisiana, this _____ day of _____, 1989.

_____

APPENDIX

IN THE UNITED STATES COURT OF APPEAL
FOR THE FIFTH CIRCUIT

No. 87-4941

D. A. DELAHOUSSAYE, ET AL.,
Plaintiffs-Appellees,

versus

RICHARD SEAL, ET AL.,
Defendants,

ROBERT (BOB) ODOM,
GILBERT LYONS, MANNING BROUSSARD
and WILLIAM BOUDREAUX,
Defendants-Appellants.

Appeal from the United States District Court
for the Western District of Louisiana

ON PETITION FOR REHEARING
(OCTOBER 31, 1988)

Before CLARK, Chief Judge, JOHNSON and JOLLY, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby

Denied

ENTERED FOR THE COURT:

/s/ Charles Clark
CHIEF JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 87-4941
Summary Calendar

D. A. DELAHOUSSAYE, ET AL.,
Plaintiffs-Appellees

versus

RICHARD SEAL, ET AL.,
Defendants,

ROBERT (BOB) ODOM,
GILBERT LYONS, MANNING BROUSSARD
and WILLIAM BOUDREAUX,
Defendants-Appellants

Appeal from the United States District Court
for the Western District of Louisiana
(CA-83-0730-0)

(October 4, 1988)

Before CLARK, Chief Judge, JOHNSON and JOLLY, Circuit Judges.

PER CURIAM: *

Defendants appeal the district court's order denying an award of attorneys fees. We affirm.

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* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion

I.

On March 23, 1983 plaintiffs filed a civil rights action pursuant to 42 U.S.C. § 1983 and pendent state law. The complaint alleged that in March, 1982, defendants voted arbitrarily and unlawfully as a majority of the Louisiana Warehouse Commission to suspend the warehouse license of Louisiana Rice Properties, Inc., and that the negative repercussions from that action caused plaintiffs' damage.

In May, 1983, defendants filed motions to dismiss for failure to state any claim upon which relief could be granted. The district court denied the motions, on the basis that plaintiffs had stated a claim under 42 U.S.C. § 1983. Defendants filed motions for summary judgment in August, 1984, and the district court denied the motions. Defendants then filed a motion to reconsider the denial of summary judgment. On April 11, 1985 the district court reconsidered and granted defendants' motion for summary judgment. This court in Delahoussaye v. Seale, 788 F2d 1091 (5th Cir. 1986) affirmed that grant of summary judgment.

Eleven months after this court's decision, defendants filed a motion for attorney's fees. A United States magistrate denied the motion holding that plaintiffs' claims had arguable merit at the time the complaint was filed and were clearly not frivolous. On appeal, the district court ruled that the denial of attorney's fees was not clearly erroneous. Defendants appeal that ruling.

II.

Under 42 U.S.C. § 1988, a district court has discretion to allow attorneys fees to a prevailing defendant in a civil rights

action not brought in bad faith, only if the action is without foundation, frivolous, or unreasonable at the time it was filed. Hughes v. Rowe, 449 U.S. 5, 14, 101 S.Ct. 173, 66 L.Ed.2d 163 (1980); Christianburg Garment Co. v. EEOC, 434 U.S. 412, 98 S.Ct. 694, 54 L.Ed.2d 648 (1978). In determining whether this standard is met, the following factors should be considered: (1) the type of consideration given to the case by the district court, (2) the length of the opinion on the merits, and (3) the arguable merit of plaintiffs' contentions. Jones v. Texas Tech University, 656 F.2d 1137, 1146 (5th Cir. 1981).

The magistrate correctly applied the foregoing principles and found that plaintiffs' complaint had consistently been taken seriously by the court. The magistrate took into consideration that the district court had initially declined to dismiss the action concluding that plaintiffs had stated a claim under § 1983. The magistrate also noted the district court's nineteen-page opinion denying summary judgment and concluded that plaintiff's contentions had arguable merit. Based on this careful consideration, the magistrate correctly determined that the action was not frivolous, groundless, or without foundation.

This factual determination was correctly found by the district court to be not clearly erroneous.

III.

Defendants have failed to demonstrate that the factual question of injury was baseless at the time the complaint was filed. We deny defnedants' request to remand for further proceedings on the factual foundation of this case in which a

grant of summary judgment has been affirmed by this court.

The judgment of the district court is

AFFIRMED.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

LOUISIANA RICE PROPERTIES, ET AL
VS. CIVIL ACTION NUMBER 83-0730
RICHARD SEAL, ET AL SECTION: O

RULING

Now before the court is the motion by defendants Bob Odom, Commissioner of the Department of Agriculture, Richard Seal, Gilbert Lyons, Manning Broussard, and William Boudreaux appealing the United States Magistrate's order of August 20, 1987, wherein the Magistrate denied defendants' motion for attorney's fees. D. A. DelaHoussaye, on behalf of plaintiffs, has appealed from the Magistrate's order of October 8, 1987, wherein the Magistrate granted defendants an extension of time within which to file a notice of appeal.

Plaintiffs originally filed an action under 42 U.S.C. § 1983, alleging:

> [Defendants] used their positions as Warehouse Commission and Louisiana Department of Agriculture officials to arbitrarily deprive and violate plaintiffs' constitutionally-protected property right to operate one's business pursuant to State License and otherwise without arbitrary, unlawful governmental intrusion and interference.

Plaintiffs' Memordum in Opposition to Motion to Dismiss, May 27, 1983, at 3.

Plaintiffs alleged that on March 26, 1982, defendants voted as a majority of the Louisiana Warehouse Commission ("the Commission") to suspend the warehouse license of plaintiff, Louisiana Rice Properties, Inc. ("LRP"), because of the economic problems suffered by a related corporation, Southwest Louisiana Grain Corporation "(Southwest Grain"). Defendants suspended LRP's warehouse license because of LRP's close relationship with Southwest Grain, and because of LRP's ability to generate much needed cash through the issuance of warehouse receipts.

Plaintiffs asserted that defendants knew that LRP was a distinct corporate entity and had not violated any state statutes. Plaintiffs further claimed that they received notice of the Commission's suspension of LRP's license on March 31, 1982. The notice cited "discrepancies in [LRP's] warehouse audit" as the reason for the Commission's suspension of the license. The notice, however, was sent the very day defendants inspected LRP's books, following which the inspectors determined that there were no discrepancies. The Commission ultimately reinstated LRP's license on April 27, 1982.

Plaintiffs further claimed that defendants advised a newspaper of their intention to seize control of facilities operated by LRP on March 30, 1982, despite the fact that the inspection was not to be performed until the next day. On March 31, 1982, defendants informed other media across the state that the Louisiana Department of Agriculture had seized and closed LRP, as well as three facilities owned by DelaHoussaye in

Kaplan, because these facilities owed $600,000 to area farmers. Plaintiffs alleged that defendants knew that LRP was a distinct entity and that the audit by the inspectors had not revealed any discrepancies or violations at the time of these communications. On April 1, 1982, several newspapers printed the information which had been released by defendants. Plaintiffs finally claimed that they suffered injury to their corporate reputation and suffered financial losses, including the refusal of any suppliers to continue to provide inventory on credit and the creation of serious cash flow problems, as a direct result of defendants' actions.

The Magistrate found that this court had "consistently" taken plaintiffs' complaint "seriously". The Magistrate noted that the court had denied defendants' motion to dismiss for failure to state a claim, stating:

> After a careful review of the pleadings, and allegations of fact contained therein, the court concludes that plaintiff has stated a claim under 42 U.S.C.§ 1983.

Memorandum Ruling entered April 11, 1985, pp. 16-17.

The Magistrate further observed that although the court had later granted defendants' motion for summary judgment, the ruling recognized that plaintiffs had been deprived of a protected property and liberty interest when LRP's license had been suspended. The court granted defendants' motion for summary judgment on the finding that the post-deprivation procedures available to plaintiffs were imperfect, but nevertheless met the requirements of due process. The Magistrate therefore found that because plaintiffs' claims had arguable

merit at the time the complaint was filed, defendants' motion for attorney's fees was without merit. Therefore, the magistrate denied defendants' motion for attorney's fees.

This court's review of the Magistrate's order is limited to a clearly erroneous standard. Local Rule 28(d) (1) of the Local Rules for the Western District of Louisiana states, in part:

> A District Judge of the Court shall consider the appeal and shall set aside any portion of the Magistrate's order found to be clearly erroneous or contrary to law.

Local Rule 28(d) (1).

42 U.S.C. § 1988 provides that "the court, in its discretion, may allow the prevailing party... a reasonable attorney's fee." Prevailing defendants in a civil rights action receive attorney's fees only if the action is without foundation, frivolous, or unreasonable, even though the action was not brought in subjective bad faith. Christianburg Garment Co. v. EEOC, 434 U.S. 412, 98 S.Ct. 694, 54 L.Ed.2d 648 (1978). The fact that a plaintiff may ultimately lose his case is not in itself a sufficient justification for the assessment of fees. Hughes v. Roe, 449 U.S. 5, 101 S.Ct. 173, 661 L.Ed.2d 163 (1980).

In applying the foregoing principles, the Magistrate determined that plaintiffs' claims were not so "devoid of arguable legal merit or factual support as to be frivolous[.]" Jones v. Texas Tech U., 656 F2d 1137, 1146 (5th Cir. 1981). In determining that defendants' motion for attorney's fees should be denied, the Magistrate carefully weighed the consideration this court had given to the case, the length of the court's opinion, and the arguable merit of plaintiffs' contentions.

Defendants have not determined that plaintiffs' claims were frivolous at the time the claims were filed. Moreover, defendants have not shown the court why the Magistrate's order is clearly erroneous. Therefore, this court finds that the Magistrate's order of August 20, 1987, is not clearly erroneous. The court therefore affirms the Magistrate's denial of defendants' motion for attorney's fees.

The court will now address plaintiffs' appeal of that part of the Magistrate's order granting defendants an extension of time within which to appeal. Given the court's affirmance of the Magistrate's denial of defendants' motion for attorney's fees, plaintiffs' appeal appears to be of little consequence. Nevertheless, the court will address plaintiffs' appeal.

On October 6, 1987, defendants filed a pleading styled "Motion for Out of Time Appeal." The Magistrate granted defendants' motion on an ex parte basis, without having afforded the plaintiffs an opportunity to oppose. Plaintiffs claim that defendants' appeal was untimely, and, therefore, that the Magistrate should have denied defendants' motion to file an appeal.

Being limited to a clearly erroneous standard of review, the court must affirm the Magistrate's order. Plaintiffs have not been prejudiced in any way by the Magistrate's order. In fact, plaintiffs have prevailed on defendants' motion for attorney's fees. Moreover, the court cannot reweigh the evidence that was before the Magistrate when she permitted defendants to file an untimely appeal. Rather, the court must accept the Magistrate's ruling as not being clearly erroneous, as plaintiffs have not provided the court with evidence indicating otherwise.

Accordingly, the Magistrate's order of August 20, 1987 is hereby AFFIRMED in all respects.

Opelousas, Louisiana, November 30, 1987.

/s/ John M. Shaw

JOHN M. SHAW

UNITED STATES DISTRICT JUDGE.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

LOUISIANA RICE PROPERTIES, ET AL

VS. CIVIL ACTION NUMBER 83-0730
RICHARD SEAL, ET AL SECTION O - JUDGE SHAW

JUDGMENT

These motions came on for hearing before the United States District Court, Judge John M. Shaw presiding, and the motions having been duly heard and a decision having been duly rendered,

IT IS ORDERED, ADJUDGED, AND DECREED that the Magistrate's order of August 20, 1987, is hereby AFFIRMED in all respects.

Opelousas, Louisiana, November 30, 1987.

/s/ John M. Shaw
JOHN M. SHAW
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

D. A. DELAHOUSSAYE, ET AL	CIVIL ACTION NO.: 83-0730
VS.	SECTION: O
RICHARD SEAL, ET AL	JUDGE SHAW

ORDER

Defendants, Bob Odom, Richard Seal, Gilbert Lyons, Manning Broussard and William Boudreaux, the prevailing parties in this action brought pursuant to 42 U.S.C. § 1983, filed a motion for attorneys' fees under 43 U.S. C. § 1988. Plaintiffs, D. A. Delahoussaye, Louisiana Rice Properties, Inc., Rice Sales, Inc., and Del Rico, Inc., have opposed the motion.

§ 1988 provides that "the court, in its discretion, may allow the prevailing party... a reasonable attorney's fee." Prevailing defendants in a civil rights action receive attorney's fees only if the action is without foundation, frivolous or unreasonable, even though not brought in subjective bad faith. Christianburg Garment Company v. EEOC, 434 U.S. 412, 98 S.Ct., 694, 54 L.Ed.2d 648 (1978). The fact that a plaintiff may ultimately lose his case is not in itself a sufficient justification for the assessment of fees. Hughes v. Roe, 449 U.S. 5, 101 S.Ct. 173, 661 L.Ed.2d 163 (1980). In order to meet the Christianburg test, the plaintiff's action must be meritless in the sense that it is groundless or without foundation. Id. 449 U.S. at 14.

In applying the foregoing principles, the court must

determine whether the plaintiffs' case was so "devoid of arguable legal merit or factual support as to be frivolous within the meaning of Christianburg." Jones v. Texas Tech U., 656 F.2d, 1137, 1146 (5th Cir. 1981). In Jones, the Fifth Circuit reversed the lower court award of attorney's fees against the plaintiff. The district court had dismissed the suit on the grounds that a consent judgment in a previous suit barred the present action as res judicata.

The fifth Circuit court considered the following factors to indicate that the suit was not frivolous:

1. The careful consideration given to the case by the district court;
2. The length of the opinion on the merits;
3. The arguable merit of Jones' contentions.

Plaintiffs in this case filed an action under 42 U.S.C. § 1983, alleging that defendants "used their positions as Warehouse Commission and Louisiana Department of Agriculture officials to arbitrarily deprive and violate plaintiffs' constitutionally-protected property right to operate one's business pursuant to State License and otherwise without arbitrary, unlawful governmental intrusion and interference.[1] Plaintiff alleged that on March 26, 1982, defendants voted as a majority of the Louisiana Warehouse Commission (the Commission) to suspend the warehouse license of plaintiff, Louisiana Rice Properties, Inc., (LRP) because of economic problems suffered

[1] Plaintiff's Memorandum in Opposition to Motion to Dismiss, May 27, 1983, at 3.

by a related corporation, Southwest Louisiana Grain Corporation (Southwest Grain). Defendants suspended LRP's warehouse license because of its close interconnection with Southwest Grain and its ability to generate much needed cash through the issuance of warehouse receipts.

According to plaintiffs, however, defendants knew that LRP was a distinct corporate entity and had not violated any state statutes. Plaintiffs also claimed that they received notice of the Commission's suspension of LRP's license on March 31, 1982. The notice cited "discrepancies in [LRP's] warehouse audit." This was the same day defendants inspected LRP's books, however, following which the inspectors determined that there were no discrepancies. LRP's license ultimately was reinstated on April 27, 1982.

Furthermore, plaintiffs complained that defendants advised a newspaper of their intention to seize control of facilities operated by LRP on March 30th, even though the inspection was not to be performed until the next day. On March 31st, defendants informed other media across the state that the Louisiana Department of Agriculture had seized and closed LRP as well as three facilities owned by Delahoussaye in Kaplan because they owed $600,000.00 to area farmers. Plaintiffs alleged that defendants knew that LRP was a distinct entity and that the audit by the inspectors had revealed no discrepancies or violations at the time of these communications. Several newspapers printed the information released by defendants on April 1st.

Plaintiffs claimed that they suffered injury to their corporate reputations and suffered financial losses as a direct

result of defendants' actions, including the refusal of any suppliers to continue to provide inventory on credit and the creation of serious cash flow problems.

Plaintiffs' complaint has consistently been taken seriously by the court. Defendants' motion to dismiss for failure to state a claim was denied. The court stated: "After a careful review of the pleadings and allegations of fact contained therein, the court concludes that plaintiff has stated a claim under 42 U.S.C. § 1983."

Although the court later granted defendants' motion for summary judgment, the nineteen-page ruling recognized that plaintiffs were deprived of a protected property and liberty interest when LRP's license was suspended. The court also stated, "Whether the state's conduct can be considered negligent or intentional, it is clear that it was not pursuant to any established state procedure but was random and unauthorized."[2] Judgment was granted to defendants on a finding that the post-deprivation procedures available were imperfect, but met the requirements of due process.

Plaintiffs' claims had arguable merit at the time the complaint was filed; they clearly were not frivolous.

In view of the foregoing, IT IS ORDERED that defendant's motion for attorney's fees is denied.

Lafayette, Louisiana this 20th day of August, 1987.

/s/ Mildred E. Methvin

MILDRED E. METHVIN

U. S. Magistrate

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[2] Memorandum Ruling entered April 11, 1985, pp. 16-17

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

D. A. DELAHOUSSAYE, ET AL

CIVIL ACTION NUMBER 83-0730

VS. SECTION O

RICHARD SEAL, ET AL

RULING

Now before the Court is the motion of all five defendants (Robert Odom, Richard Seale, Gilbert Lyons, Manning Broussard and William Boudreaux) to reconsider denial of summary judgment, and the two separate summary judgment motions of defendants Broussard and Boudreaux and of defendants Lyons and Seale. For the reasons hereinafter set out, the summary judgment motion filed by all defendants is hereby GRANTED; therefore, the remaining summary judgment motions are moot.

Plaintiffs in this case have brought an action under 42 U.S.C. § 1983, alleging that defendants "used their positions as Warehouse Commission and Louisiana Department of Agriculture officials to arbitrarily deprive and violate plaintiffs' constitutionally protected property right to operate one's business pursuant to State License and otherwise without arbitrary, unlawful governmental intrusion and interference."[1] The

[1] Plaintiff's Memorandum in Opposition to Motion to Dismiss, May 27, 1983, at 3.

plaintiffs, three Louisiana corporations and Deblanc Delahoussaye, a part owner and officer of the three corporations, allege that on March 26, 1982, defendants Odom, Seale and Lyons voted as a majority of the Louisiana Warehouse Commission (the Commission) to suspend the warehouse license of plaintiff Louisiana Rice Properties, Inc. (LRP) because of economic problems faced by a related corporation, Southwest Louisiana Grain Corporation (Southwest Grain).

Defendants claim that their action was justified by an audit and examination of LRP's Unit 4 (Southwest Grain), which revealed that Southwest Grain was unable to meet its financial obligations to farmers and carried a debt of over $600,000.00. Delahoussaye confirmed these findings in a meeting with defendant Odom on February 25, 1982. According to defendants, Southwest Grain did not hold a warehouse license but did hold a grain dealer's license, and speculation in the sale of grain had caused the failure of Southwest Grain. Defendants suspended LRP's warehouse license because of its close interconnection with Southwest Grain [2] and "its ability to generate much needed cash through the issuance of warehouse receipts on and the sale of grain not beloning to it and the history that others similarly situated had done so." [3]

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[2] Defendants claim the two corporations were family-owned and closely interconnected both operationally and financially, as evidenced by their common officers, board of directors and bookkeepers.

[3] Defendants' Brief and Supporting Documents in Support of Motion for Summary Judgment, October 1, 1984, at 4-5.

According to plaintiffs, however, defendants knew that LRP was a distinct corporate entity and had not violated any state statutes. Plaintiffs also claim that they did not receive notice of the Commission's suspension until March 31, when plaintiff Delahoussaye received a letter from Odom advising that the warehouse license held by LRP had been suspended under the authority of LSA-R.S. 54:257 "because of discrepancies in your warehouse audit." The letter was hand delivered by defendant Boudreaux, assistant director of the Commission. Boudreaux was also one of three inspectors allegedly sent on March 31 to inspect and audit the books of LRP, after the written notification of suspension was delivered. Following their inspection, these inspectors determined that there were no discrepancies in LRP's warehouse receipt books. Plaintiffs claim that Odom had also directed the inspectors to take over the operations of Rice Capital Sales, Inc. and Del Rico, Inc., but that the books of these corporations were never inspected.

Furthermore, plaintiffs complain that defendants advised a Monroe newspaper of their intention to seize control of "facilities operated by" LRP on March 30, even though the inspection was not to be performed until the next day. On March 31, defendants and press officer Larry Michaud informed other media across the state that the Louisiana Department of Agriculture had seized and closed LRP as well as the three facilities owned by Delahoussaye in Kaplan because they owed $600,000 to area farmers. Plaintiffs allege that defendants knew that LRP was a distinct entity and that the audit by the inspectors had revealed no discrepancies or violations by the time of these communications. Several newspapers printed the information

released by defendants on April 1.

On April 2, Larry Michaud advised Delahoussaye that defendants had made a mistake and that they would issue a retraction. The Commission held a hearing on April 23 wherein it determined that the warehouse license of LRP would be reinstated. Plaintiffs allege that no retraction was issued until April 27, 1982, when Louisiana newspapers were advised that the warehouse license of Louisiana Rice Properties had been reinstated.

According to plaintiffs, the decision to "close down" and suspend the warehouse license of Louisiana Rice Properties, the arbitrary seizure of Rice Capital Sales and Del Rico and the communication of these unlawful actions to Louisiana newspapers and media constituted violations of section 1983. Plaintiffs claim they have suffered injury to their corporate reputations and have suffered financial losses as a direct result of defendants' actions, including the refusal of many suppliers to continue to provide inventory on credit and serious cash flow problems. Plaintiffs have also alleged a pendent state claim under LSA-C.C. art. 2315 for tortious interference with plaintiffs' business and damage to the businesses' reputations. Plaintiff Delahoussaye has also brought a separate state libel action, alleging that defendants announced to the media on March 31 that the Department of Agriculture had audited Delahoussaye personally and found that he owed area farmers $600,000 as owner of Louisiana Rice Properties.

There are two essential elements to any section 1983 action. First, the conduct complained of must have been committed by a person acting under color of state law, which is not

disputed in this case. Second, defendants' conduct must have deprived the plaintiff of rights, privileges, or immunities secured by the Constitution or laws of the United States. Parratt v. Taylor, 451 U.S. 527, 535 (1981). Viewed in the light most favorable to plaintiffs, the complaint in this case asserts only two constitutional violations: the deprivation of liberty and property interests without due process of law, in violation of the due process clause of the fourteenth amendment.

The fourteenth amendment encompasses violations of both procedural and substantive due process. Generally, substantive due process claims involve conduct which infringes upon certain provisions of the Bill of Rights made applicable to the states through the fourteenth amendment. Due process standing alone also has a substantive aspect in cases of serious physical violence involving conduct that shocks the conscience, Rochin v. California, 342 U.S. 165, 172 (1952); Shillingford v. Holmes, 634 F.2d 263, 265 (5th Cir. 1981); and may in cases of excessive abusive behavior, with a caveat that "implication of nontextual substantive rights from the general monitions of the due process clause is a matter not to be undertaken lightly but only with the caution of seasoned and mature thought." Rutherford v. United States, 702 F.2d 580, 584 (5th Cir. 1983). Although the Supreme Court outlined the appropriate analysis of procedural due process claims in Parratt, 451 U.S. at 527, the restrictive Parratt analysis does not apply to these substantive due process violations. Thibodeaux v Bordelon, 740 F.2d 329

(5th Cir. 1984).[4]

The plaintiffs have alleged no substantive due process claims in this case, however, for the temporary suspension of their licenses and injury to their business reputations. The Fifth Circuit has held that "the fourteenth amendment provides only procedural protection against injury inflicted by state officers" to reputation interests. In re Selcraig, 705 F.2d 789 (5th Cir. 1983). Nor have plaintiffs characterized the temporary license suspension as "conscience shocking" or excessively abusive conduct which is inherently impermissible. Schiller v. Strangis, 540 F. Supp. 605, 614-15, (D. Mass. 1982). Therefore plaintiffs can only claim that the state has unlawfully interfered with protected property or liberty interests [5] by failing to provide adequate procedural safeguards; that the procedures used by the state were inadequate in light of the significance of the affected interests. Schiller, 540 F. Supp. at 613.

Accordingly, whether plaintiffs have alleged a cognizable violation of their fourteenth amendment right to procedural due process involves a dual inquiry: were they deprived

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[4] As the Fifth Circuit noted in Thibodeaux, 740 F.2d at 338 n.9, however, "[a]s the particular liberty interest at stake increases in importance, the adequacy of a postdeprivation damages remedy may decrease." At some point the individual interest becomes so important that the impossibility of a prior hearing will not justify allowing a postdeprivation remedy to satisfy procedural due process requirements. "At such a point, procedural due process shades into substantive due process, and Parratt becomes inapplicable." Id.

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[5] In Thibodeaux, supra, the court made no distinction between deprivations of property and liberty interests.

of a protected interest, and if so, was the deprivation accomplished without adherence to due process standards? Findeisen v. North East Independent School District, 749 F.2d 234, 237 (5th Cir. 1984). The first question under the procedural due process analysis is thus whether plaintiffs have been deprived of a protected liberty or property interest.

Addressing first the temporary license suspension, this Court finds that the warehouse license does fall within the definition of "property." See, e. g. Bell v. Burson, 402 U.S. 535 (1971). There is a question of fact as to whether plaintiffs were actually deprived of this property interest, since the three companies were apparently allowed to continue operations. Yet, plaintiffs claim that the license was not reinstated until April 27, almost a month after they received notice of the suspension. For the purposes of this ruling, the Court will assume that plaintiffs were actually deprived of the property interests alleged.

Plaintiffs also alleged injury to their business reputations by the defendants' March 30 and 31 communications to the area media. In Paul v. Davis, 424 U. S. 693, 701 (1976), the Supreme Court held that "reputation alone, apart from some more tangible interest such as employment, is [not] 'liberty' or 'property' by itself sufficient to invoke the procedural protection of the Due Process Clause." The Court held that a federally recognized liberty interest is implicated only when an individual's reputation is stigmatized in connection with the denial of some specific constitutional guarantee or some "more tangible" interest. Id. at 700-01. The Fifth Circuit has found constitutional deprivations of liberty when there have been

additional injuries to employment or other interests—stigma "plus" the loss or denial of another right. In re Selcraig, 705 F.2d at 789; Marrero v. City of Hialeah, 625 F.2d 499 (5th Cir. 1980).

Moreover, the " 'plus' of the stigma-plus requirement need not itself be a protected liberty or property interest." Marrero, 625 F2d at 513 n.17. In this case, the temporary suspension of plaintiffs' warehouse license in addition to the reputational injuries would constitute a "more tangible interest" sufficient to implicate a protected liberty interest. The Court will once again assume that the plaintiffs did suffer the reputational injury alleged from the defendants' communications for the purpose of this motion.

Once a protected interest is found, then the question is raised as to whether adequate procedures were provided. As the Fifth Circuit stated in Marrero, 625 F.2d at 519, "[i]n order to state a claim under the fourteenth amendment, the complainant must allege facts showing not only that the State has deprived him of a liberty or property interest but also that the State has done so without due process of the law." Although plaintiffs have never argued that they were not accorded adequate procedural safeguards, [6] this remains the only basis for plaintiffs' claim.

In this case, Louisiana law specifies the plaintiffs' only

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[6] Opposition to Motion for Summary Judgment, Nov. 14, 1984 at 16. ("It is clear that LSA R.S. 54:247 does not provide for presuspension hearings. Reserving the right to urge at a later date that the statute is defective for this reason, plaintiffs assume for purposes of argument that the statute is constitutional on its face.")

procedural rights for suspension of warehouse licenses, providing that:

> The commission may temporarily suspend the license of any warehouse or warehouse company found violating any provision of this Chapter or the rules and regulations adopted under it.
>
> Within ten days of the suspension, the commission shall hold a hearing at which the suspended warehouse or warehouse company shall be heard in opposition to the suspension and its continuance.

LSA-R.S. 54:257. Therefore, the state has authorized certain post-deprivation remedies[7] which are provided within ten days of the temporary suspension. The question remains whether these state-provided remedies were adequate or satisfied the relevant due process standards.

In Parratt, the Supreme Court noted that many of its decisions required that a hearing take place before the state

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[7] The Supreme Court established a three-prong balancing test to determine the sufficiency of state-provided deprivation remedies in Matthews v. Eldridge, 424 U.S. 319 (1976). The test weighs: (1) the private interest that will be affected, (2) the risk of an erroneous deprivation of that interest by the procedures being used, and (3) the government's interest in the matter. Id. at 335. Although it is not necessary to apply the test in this case, the Court finds that the post-suspension hearing will adequately protect the plaintiffs' liberty and property interests under this test. In weighing the various interests involved, ten days does not seem an unreasonable delay for such a hearing. Nor does there seem to be a high risk of erroneous deprivation from the state procedures, which are only "temporary" until the hearing is conducted. Moreover, plaintiffs have not challenged the constitutionality of the state statute or procedures.

interfered with a liberty or property interest of its citizens. In these cases the deprivation was authorized by state procedure and thus it was possible for the state to provide notice and a hearing before the deprivation occurred. Thibodeaux, 740 F.2d at 334, citing Parratt, 451 U.S. at 537-38. On the other hand, the Court noted that other decisions have held that state post-deprivation remedies could satisfy the due process clause. Id. See, e. g., Ingraham v. Wright, 430 U.S. 651 (1977). The Court added that:

> [t]hese cases recognize that either the necessity of quick action by the State or the impracticality of providing any meaningful predeprivation process can, when coupled with the availability of some meaningful means by which to assess the propriety of the State's action at some time after the initial taking, satisfy the requirements of procedural due process... we have rejected the proposition that 'at a meaningful time and in a meaningful manner' always requires the State to provide a hearing prior to the initial deprivation of property. This rejection is based in part on the impracticability in some cases of providing any pre-seizure hearing under a state-authorized procedure, and the assumption that at some time a full and meaningful hearing will be available.

Parratt, 451 U.S. at 539-41.

Therefore the relevant inquiry under the Parratt analysis is whether the deprivation occurred through an established state procedure, since the Supreme Court held in Logan v. Zimmerman Brush Co., 455 U. S. 422 (1982), that post-deprivation remedies do not satisfy due process where a deprivation of property is caused by conduct pursuant to established state

procedure, rather than "random and unauthorized action." As the Supreme Court stated in Hudson v. Palmer, _____ U. S. _____, 104 S.Ct. 3194, 3203 (1984),

> [t]he underlying rationale of Parratt is that when deprivations of property are effected through random and unauthorized conduct of a state employee, predeprivation procedures are simply 'impracticable' since the state cannot know when such deprivations will occur.

In Hudson, the court also applied the Parratt analysis to intentional deprivations of property, noting that "intentional acts are even more difficult to anticipate."[8] Id. Moreover, the court noted that even though a state agent who intends to deprive a person of his property can provide predeprivation process, "[w]hether an individual employee himself is able to foresee a deprivation is of no consequence. The controlling inquiry is solely whether the State is in a position to provide for predeprivation process." Id at 3204.

Regarding plaintiffs' alleged deprivation of a property interest in their warehouse license, it is clear that the deprivation did not occur as a result of an established state procedure. To

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[8] The Supreme Court stated in Hudson that "an unauthorized intentional deprivation of property by a state employee does not constitute a violation of the procedural requirements of the due Process Clause of the Fourteenth Amendment if a meaningful postdeprivation remedy for the loss is available. For intentional, as for negligent deprivations of property by state employees, the State's action is not complete until and unless it provides or refuses to provide a suitable postdeprivation remedy." 104 S.Ct. at 3203.

either negligently or intentionally suspend the license of a solvent business can only be characterized as random and unauthorized. As in Hudson, the state is unable to foresee the potential negligent or intentional deprivation of a license or property interest, rendering predeprivation process impracticable. Furthermore, the state has provided a full and meaningful hearing within a reasonable time after the deprivation.

On the other hand, Logan v. Zimmerman Brush Company, supra, is a classic example of a deprivation effectuated through an established state procedure which destroyed the claimants' entitlement without according him proper procedural safeguards. Therein, Zimmerman Brush Company discharged the plaintiff purportedly because his short left leg made it impossible for him to continue as a shipping clerk. Logan brought his unlawful discharge complaint to the Illinois Fair Employment Practices Commission. The Commission, apparently through inadvertence, scheduled the necessary conference for five days after the expiration of the statutory limitation period for claims. The Illinois Supreme Court held that Logan's claim was thereby extinguished, but the United States Supreme Court reversed.

It is clear that Logan's loss happened by operation of law. Logan had a state-created property interest which the state cannot destroy at will. Logan received no hearing and some form of hearing is a sine qua non before he could finally be deprived of a protected property interest. Unlike Logan, here the plaintiffs are challenging the Commissioner's error, not the established state procedure. As the Fifth Circuit stated in Marshall v. Norwood, 741 F.2d 761, 763 (5th Cir. 1984), "[i]n

Parratt, the Supreme Court distinguished between 'a challenge to an established state procedure as lacking in due process and a property damage claim arising out of the misconduct of state officers.' 451 U.S. at 542." (Emphasis added.)

Furthermore, in Parratt the Supreme Court held that when the state provides an adequate and independent tort remedy for the deprivation, even though the remedial process comes after the deprivation has occurred, the state remedy constitutes sufficient due process under the fourteenth amendment. 451 U.S. at 543-44. Louisiana law affords plaintiffs a tort cause of action against all of the defendants in this suit. Plaintiffs have conceded this by taking advantage of the available state remedies, attaching pendent state claims under La. Civil Code article 2315 et seq. The availability of this remedy provides the plaintiffs with all the process that is due, and their complaint should therefore be dismissed.

An additional argument that defendants could have made is that the same legislation which created the property entitlement to a warehouse license also created the procedure for its suspension and the opportunity for a hearing to oppose the suspension. How then can the plaintiffs expect to have any entitlement to a pre-suspension hearing? The only guarantee the state provides is a post-suspension hearing in clear and unequivocal terms. It may be said that plaintiffs could expect no more. [9]

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[9] The alleged deprivation of a liberty interest ("stigma"), however, could be more complicated, see, Vitek v. Jones, 445 U.S. 480 (1980), but the distinction between a property or liberty interest in this context may not be tenable.

Plaintiffs also claim that they were deprived of a liberty interest through the alleged injury to their business reputations. The Fifth Circuit specifically outlined the requirements for establishing denial of due process for reputational injuries in Selcraig, 705 F.2d at 797, including showing publication of the charges, injury to business or employment, and denial of a name-clearing hearing. According to the court, "[p]ublication is shown by official interviews with the press." Id. In this case, the Commission issued press releases concerning the license revocation. Yet even assuming that plaintiffs have been "injured" by the communications, just as in Selcraig they have not shown that defendants deprived them of their right to a hearing.

In Selcraig, the plaintiff had waived his right to a due process hearing when he "settled" his dispute with defendants. 705 F.2d at 793. Similarly, in this case plaintiffs agreed in a telephone conversation on March 31 that "the hearing previously set for April 7, 1982, in accordance with LSA-R.S. 54:257, would be set aside without date."[10] Thus the defendants waived their right to a name-clearing or post-deprivation hearing, the only procedural remedy afforded by statute. Moreover, Selcraig held that procedural rights for this type of violation do not need to precede publication. Id. at 798. See also Wells v. Dallas Independent School District, 576 F. Supp. 497, 510 (N.D. Tex. 1983) ("a maligned employee has a right to a procedure that will afford him a right to refute unfounded charges, i.e., a hearing, but that hearing need not precede

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[10] Defendants' Brief and Supporting Documents in Support of Motion for Summary Judgment, October 1, 1984, at Exhibit C.

publication.")

In summary, plaintiffs do not contend that more exacting procedural safeguards should have been imposed by the State before the imposition of plaintiffs' license suspension. In fact, plaintiffs concede the constitutionality of the statutes under which the state acted as well as the adequacy of the available state tort remedies. What the plaintiffs do claim is that their deprivation resulted from the faulty determination made by the state to suspend plaintiffs' license. Whether the state's conduct can be considered negligent or intentional, it is clear that it was not pursuant to any established state procedure but was random and unauthorized. It is also clear that predeprivation safeguards to prevent the occurrence of this type of alleged conduct are not practical or feasible. Further, the plaintiffs do not contend that they are entitled to any additional predeprivation safeguards, or even remotely suggest what they might be. It has been said that due process does not mean perfect process.

One final issue that might have been raised to support the defendants' position is the doctrine of sovereign immunity under the eleventh amendment, barring suits against a state by its own citizens or citizens of other states. Likewise, the eleventh amendment bars suits against state officials, agencies or employees when the state is the real, substantial party in interest. Pennhurst State School and Hospital v. Halderman, _____ U. S. _____, 104 S.Ct. 900, 908 (1984). Eleventh amendment immunity applies unless a federally created right is at issue or a state has either consented to suit in federal court or waived application of the eleventh amendment. Parden v. Terminal Railroad Co., 377 U.S. 1984, 186 (1964).

Ex parte Young, 209 U. S. 123 (1908), recognizes an important exception to this general rule, holding that a suit challenging the federal constitutionality of a state official's action is not one against the state. Yet the Young exception serves only to permit a federal court to grant prospective injunctive relief; federal courts remain barred under the eleventh amendment from granting legal or equitable retroactive relief. Chiz's Motel v. Mississippi State Tax Commission, No. 83-4787 (5th Cir. Jan. 21, 1985), citing Pennhurst at 909-10. Furthermore, the need to promote the supremacy of federal law recognized in Young is absent when the plaintiff alleges that a state official has violated state law, as in this case. When a federal court instructs state officials on how to conform their conduct to state law, this conflicts directly with the principles of federalism that underlie the eleventh amendment. Pennhurst, 104 S.Ct. at _____.

In this case, the defendants are all state officials who acted within the sphere of their official responsibilities in conformance with the state guidelines for termination of warehouse licenses. The defendants had nothing to gain personally from their conduct, as in Pennhurst, although there remains a question as to whether they acted negligently or even willfully. As the court stated in Pennhurst, "a federal suit against state officials on the basis of state law contravenes the Eleventh Amendment when - as here - the relief sought and ordered has an impact directly on the State itself." Id. at _____. Louisiana law provides that the state shall hold harmless and indemnify all officers and employees of the state from any financial loss arising out of any claim, demand, suit or judgment

in federal court brought under 42 U.S.C. §§ 1981 through 1983 in the event the officer or employee was acting in the discharge of his duties and within the scope of his employment. LSA-R.S. 13:5108.1. Therefore, any liability for defendants' actions rests with the Department of Agriculture and on the state of Louisiana. La. Civ. Code arts. 3021, et seq. Although it could be argued that this statute constitutes a waiver of eleventh amendment immunity, Louisiana law expressly provides that "[n]o suit against the state, state agency or political subdivision shall be instituted in any court other than a Louisiana state court." LSA-R.S. 13:5106.

For the foregoing reasons, the motion for summary judgment filed by defendants is hereby GRANTED.

Opelousas, Louisiana, April 11, 1985.

/s/ John M. Shaw

JOHN M. SHAW

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

D. A. DELAHOUSSAYE, ET AL

VS. CIVIL ACTION NUMBER 83-0730

RICHARD SEALE, ET AL SECTION O

JUDGMENT

Upon consideration of the summary judgment motion filed herein by defendants, it is

ORDERED, ADJUDGED AND DECREED that the claims brought under 42 U.S.C. § 1983 be dismissed with prejudice, and that the pendant state claims be dismissed without prejudice.

Opelousas, Louisiana, April 11, 1985.

/s/ John M. Shaw

JOHN M. SHAW

UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

D. A. DELAHOUSSAYE, ET AL.,
Plaintiffs-Appellants,
v.
RICHARD SEALE, ET AL.,
Defendants-Appellees.

No. 85-4345
OPINION

Filed May 2, 1986

Before: John R. Brown, Sam D. Johnson, and E. Grady Jolly, Circuit Judges.

Opinion by Judge Sam D. Johnson

Appeal from the United States District Court
for the Western District of Louisiana
John M. Shaw, District Judge, Presiding

SUMMARY

Civil Rights

Appeal from a grant of summary judgment for the defendants in a suit brought under 42 U.S.C. § 1983. Affirmed.

Appellant owned and operated four grain warehouses or businesses dealing in grain. Defendants were members of the

Louisiana Warehouse Commission, which invoked its power under Louisiana Revised Statutes Ann. Sec. 54:257-258 to suspend the license of one of appellant's warehouses after an audit showed it was unable to meet its obligations. A representative of the Warehouse Commission was appointed to direct and supervise the operation of the warehouse, as provided by law, and a press release issued. After a hearing, the commission reinstated the warehouse license, finding no irregularities existed. Appellant brought suit pursuant to section 1983 alleging the commissioners had deprived them of protected property and liberty interests without due process in violation of the Foureenth Amendment. The district court granted summary judgment for the defendants, concluding that the postdeprivation procedural safeguards accorded plaintiffs all the process due. Appellants contend that the deprivations were unlawful in the absence of a predeprivation hearing.

[1] The Due Process Clause of the Fourteenth Amendment requires "some form of hearing" before an individual is finally deprived of a protected property or liberty interest, but the timing of the required hearing varies depending upon an appropriate accommodation of the competing interests involved in any particular case. Although due process usually requires a hearing prior to a state's initial interference with an individual's protected property, 2] postdeprivation procedures provided by the state can satisfy the requirements of due process. [3] The district court's reliance on *Parratt v. Taylor*, 451 U.S. 527 (1981) is misplaced, since that case held that a prior hearing was not possible to protect against a state employee's random and unauthorized conduct, [4] while the

necessity of quick action by the state in order to safeguard important interests can justify prehearing deprivations. The Supreme Court has recognized that protecting the public from economic harm can justify the immediate seizure of property without a prior hearing. [5] The temporary suspension procedures set out in section 54:257-258 reflect an appropriate accommodation of the competing interests involved, and the prompt postdeprivation hearing therefore accorded appellants all the process due. The deprivation was only temporary, did not cause the appellant to cease operations, and was allowed only after a showing of cause. [6] Given the procedural safeguards as well as the strong and traditional public interest in permitting temporary prehearing grain warehouse license suspensions, appellants have failed to state a violation of the Due Process Clause and the dismissal is affirmed.

OPINION

SAM D. JOHNSON, Circuit Judge:

Plaintiffs-appellants appeal from the district court's summary judgment in the instant case brought pursuant to 42 U.S.C. § 1983. The district court found that plaintiffs had failed to state a violation of the Due Process Clause of the Fourteenth Amendment. We agree. Accordingly, the judgment of the district court is affirmed.

I. BACKGROUND

Plaintiff D. A. Delahoussaye was the president, chairman of the board, and principal shareholder of four separately incorporated agricultural firms. Three of the four firms, Louisiana Rice Properties, Inc. ("Louisiana Rice"), Rice Capital Sales, Inc., and Del Rico, Inc., are also plaintiffs in the instant case. Louisiana Rice was a licensed agricultural warehouse under La. Rev. Stat. Ann. § 54:241 (West 1979) (repealed 1983). The fourth firm, Southwest Louisiana Grain, Inc., was a licensed grain dealer under La. Rev. Stat. Ann. §§ 3:681-690 (West 1979) (repealed 1983). Although separately incorporated, the four corporations were closely interconnected both operationally and financially. For example, the corporations shared the same ownership and management. Moreover, substantial overlap existed among the facilities and employees of the four corporations.

Defendants in the instant case include three former members of the Louisiana Warehouse Commission ("Commission"), Robert Odom, [1] Richard Seale, and Gilbert Lyons, as well as two former Commission employees, Manning Broussard and William Boudreaux. The Commission was empowered under Louisiana law to issue licenses for the operation of agricultural warehouses and to "[m]ake and enforce regulations governing the operation and supervision of [such] warehouses..." La. Rev. Stat. Ann § 54:247 (West 1979) (repealed 1983). The Commission was further empowered to "inspect the premises and the books, accounts, and records of each operator of a

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[1] Robert Odom was also the Louisiana Commissioner of Agriculture.

farmer's warehouse for the purpose of determining the operator's ability to fulfill his outstanding obligations to the producers for whom the operator is storing agricultural commodities." La. Rev. Stat. Ann. § 54:248 (1986) (amended 1982). As part of the Commission's regulatory authority, La. Rev. Stat. Ann. § 54:257 (West 1979) (repealed 1983), provided that:

> The commission may temporarily suspend the license of any warehouse or warehouse company found violating any provision of this Chapter or the rules and regulations adopted under it.
>
> Within ten days of the suspension, the commission shall hold a hearing at which the suspended warehouse or warehouse company shall be heard in opposition to the suspension and its continuance.

Furthermore, section 258 provided that during a section 257 temporary suspension, "an agent of the commission shall direct and supervise the operation of the warehouse or warehouse company under the direction of the commission." La. Rev. Stat. Ann. § 54:258 (West 1979) (repealed 1983).

In the midst of an agricultural downturn evidenced by the failure of a number of Louisiana grain dealers, the Commission conducted an audit of Southwest Grain on February 8-9, 1982.[2] As a result of this audit, the Commission discovered that Southwest Grain owed sixty-nine local farmers 96,800 bushels of soybeans valued at approximately $610,000. After several

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[2] Only the books of Southwest Grain were examined during this audit. According to plaintiffs, a previous audit of Louisiana Rice's books conducted on December 4, 1981, had revealed no irregularities.

weeks of attempting to prevent the failure of Southwest Grain and after meeting with Delahoussaye, Commissioner Bob Odom determined that Southwest Grain was unable to meet its obligations to the sixty-nine farmers.

Concerned over the effect of Southwest Grain's impending failure on Delahoussaye's other agricultural operations, the Commission met on March 26, 1982, to consider what action should be taken. According to defendants, the Commission was particularly concerned that Louisiana Rice, a licensed warehouse, would issue warehouse receipts on nonexistent grain as a means of providing funds to Delahoussaye's troubled grain dealing operations. The Commission unanimously agreed to temporarily suspend the warehouse license of Louisiana Rice.[3]

On March 31, 1982, Delahoussaye was notified of the Commission's decision in a letter signed by Commissioner Bob Odom. Specifically, the letter stated:

> The purpose of this letter is to notify you that the Warehouse Commission by vote on March 26, 1982, suspended your license in accordance with LSA R.S. 54:257, because of discrepancies in your warehouse audit.

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[3] This action was apparently intended to affect all of Delahoussaye's agricultural operations. Defendants have indicated that the suspension decision was also based in part on concerns arising out of the close connections between the four separately incorporated Delahoussaye firms. Delahoussaye admitted to having transferred funds from at least one of the related firms to Southwest Grain in an attempt to avoid Southwest Grain's financial failure.

> Mr. Manning Broussard, Director, Louisiana Warehouse Commission, under the authority of LSA R.S. 54:258, has been appointed to "direct and supervise the operation" of your warehouse.

The letter further informed Delahoussaye that a hearing had been scheduled for April 7, 1982, to determine whether Louisiana Rice's warehouse license should be permanently revoked. A factual dispute exists regarding the degree to which the Commission's decision was ever actually implemented.

In additon to notifying Delahoussaye of the suspension on March 31, 1982, the Commission also issued a press release. The press release stated:

> The Louisiana Department of Agriculture Wednesday closed one grain dealership and is working with another to attempt to arrange its sale to a prospective buyer, Commissioner of Agriculture Bob Odom said.
>
> The closing affects Louisiana Rice Properties Inc. with three facilities in and near Kaplan in Vermilian Parish and one, Southwest Louisiana Grain, in Mermentau in Acadia Parish, Odom said.

The press release was reported in a number of Louisiana newspapers on the following day.

After receiving notice of the suspension, Delahoussaye reached an agreement with the Commission authorizing Louisiana Rice, Del Rico, Inc., and Rice Capital Sales, Inc. to continue in operation under the Commission's supervision. As part of the agreement, Delahoussaye agreed to close Southwest Grain.

Delahoussaye further agreed that the hearing originally scheduled for April 7, 1982, would be postponed. [4]

Eventually, following a hearing on April 23, 1981, the Commission fully reinstated the warehouse license of Louisiana Rice finding "that no financial irregularities existed in the business operations of the firm." This finding was based on an audit of Louisiana Rice's books conducted by Commission employees on March 31, 1982, after written notification of the suspension had been delivered. A press release indicating the Commission's action was issued on April 26, 1982.

Louisiana Rice, Del Rico, Inc., and Rice Capital Sales, Inc. filed the instant suit pursuant to 42 U.S.C. § 1983. [5] Plaintiffs alleged that defendants as individual Commissioners and Commission employees had deprived plaintiffs of protected property and liberty interests without due process in violation of the Fourteenth Amendment. Plaintiffs complained of three acts in particular: (1) the allegedly erroneous temporary

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[4] Later, in an April 15, 1982, letter to Commissioner Odom's attorney, Delahoussaye's attorney requested that the temporary suspension and supervision of Louisiana Rice be terminated since the normal operations of Louisiana Rice were being impaired by the Commission's action.

[5] Plaintiffs, joined by D. A. Delahoussaye, also alleged pendant state claims under La. Civ. Code Ann. art. 2315 (West Supp. 1986) for tortious interference with plaintiffs' business and damage to the businesses' reputations. Delahoussaye has also brought a separate state libel action. After granting defendants' motions for summary judgment on the § 1983 claims, the pendant state claims were dismissed without prejudice.

suspension of Louisiana Rice's warehouse license; (2) the Commission's supervision of operations at Louisiana Rice, Del Rico, Inc., and Rice Capital Sales, Inc.; and (3) the issuance of press releases notifying the public of the Commission's actions. According to plaintiffs, these acts constituted an "arbitrary, unlawful governmental instrusion and interference."

On April 11, 1985, the district court granted a motion by all five defendants for summary judgment. After concluding that plaintiffs had failed to state any violation of substantive due process, the district court analyzed whether plaintiffs had stated a procedural due process claim. The district court recognized that a question of fact existed as to whether plaintiffs were actually deprived of any constitutionally protected interest. The district court also found, however, that the postdeprivation procedural safeguards accorded plaintiffs by Louisiana law provided all the process due. Thus, the district court concluded that plaintiffs had failed to state a claim under the Due Process Clause of the Fourteenth Amendment. [6]

Plaintiffs appeal. On appeal, plaintiffs contend that the district court erred in concluding that the postdeprivation procedural safeguards provided by Louisiana law were adequate to afford plaintiffs due process. According to plaintiffs, the deprivations alleged in the instant case were unconstitutional in the absence of a predeprivation hearing designed to prevent an

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[6] The district court also concluded that plaintiffs' suit was barred by the doctrine of sovereign immunity under the Eleventh Amendment. Based on our disposition of plaintiff's appeal, we need not consider this alternate ground for the district court's summary judgment.

erroneous license suspension.[7] We disagree and conclude that the postdeprivation safeguards provided by Louisiana law provided all the process due.

II. DISCUSSION

[1] At the outset, we note that the Due Process Clause of the Fourteenth Amendment requires "some form of hearing" before an individual is finally deprived of a protected property or liberty interest. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429, 102 S.Ct. 1148, 1154, 71 L.Ed.2d 265 (1982). The timing of the required hearing varies, however, depending upon an appropriate accommodation of the competing interests involved in any particular case. *See Matthew v. Eldridge*, 424 U.S. 319, 335-36, 96 S.Ct. 893, 902-03, 47 L.Ed.2d 18 (1976); *Goss v. Lopez*, 419 U.S. 565, 580, 95 S.Ct. 729, 738-39 (1975). In the usual case, due process requires a hearing prior to a state's initial interference with an individual's protected property or liberty interest. *See, e.g., Fuentes v. Shevin*, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972) (due process required a hearing before the state authorized its agents to seize property in a debtor's possession); *Bell v. Burson*, 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed.2d 90 (1971) (driver's license could not be summarily taken without a prior hearing).

[2] In other instances, however, postdeprivation procedures provided by the state can satisfy the requirements of due process. One such instance is where a state employee's "ran-

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[7] Plaintiffs have never precisely identified the nature of the predeprivation safeguards required here by due process. However, at several points plaintiffs have suggested that a presuspension hearing was constitutionally required.

dom and unauthorized conduct" deprives an individual of a protected property or liberty interest. In such an instance, the state cannot as a practical matter provide a predeprivation hearing. Thus, postdeprivation procedures or remedies provided by the state constitute all the process due. *See Hudson v. Palmer*, ____ U. S. ____, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1984); *Parratt v. Taylor*, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981) In *Parratt* , for example, a state employee had negligently lost a state prisoner's hobby kit. After concluding that the prisoner had suffered a deprivation of property within the meaning of the Fourteenth Amendment, [8] the Supreme Court held that all the process due was provided by the state's tort claims procedure. The Court reasoned that where a tortious loss of property results from a random and unauthorized act by a state employer, "[i]t is difficult to conceive of how the State could provide a meaningful hearing before the deprivation takes place." 451 U.S. at 541, 101 S.Ct. at 1916.

[3] The alleged deprivation in the instant case, however, did not result from the random and unauthorized acts of state employees. Here, the deprivation occurred pursuant to a Louisiana statute authorizing the temporary suspension of warehouse licenses. Plaintiffs' procedural due process challenge is to "the 'established state procedure' that destroys [their] entitle-

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[8] This aspect of *Parratt* is no longer good law. *See Daniels v. Williams* _____ U. S. _____ 106 S.Ct. 662, 663 (1986) ("We conclude that the Due Process Clause is simply not implicated by a *negligent* act of an official causing unintended loss of or injury to life, liberty or property.") (emphasis in original).

ment without according [them] proper procedural safeguards." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429, 102 S.Ct. 1148, 1154, 71 L.Ed.2d 265 (1982); *see also Holloway v. Judge Dee Brown Walker, et al,* No. 85-1289, slip op. at 4605 (5th Cir. Mar. 19, 1986) (application of *Parratt* rather than *Logan* depends on whether challenge is to the validity of established procedures or the illegal and unauthorized acts of individual defendants). Thus, the district court's reliance on *Parratt* in the instant case to conclude that plantiffs had not stated a due process violation was misplaced.

[4] Nevertheless, even where the procedural due process challenge is to "established state procedure," postdeprivation procedures provided by the state can, in some instances, satisfy the requirements of due process. For example, the necessity of quick action by the state in order to safeguard important governmental or public interests can justify prehearing deprivations. *See Hodel v. Virginia Surface Mining & Reclamation Association,* 452 U.S. 264, 101 S.Ct. 2352, 69 L.Ed.2d 1 (1981) (protection of health and safety of public is paramount governmental interest justifying summary administrative action); *Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 594, 70 S.Ct. 870, 94 L.Ed. 1088 (1950) (upheld summary seizure and destruction of misbranded drugs without a preseizure hearing). Thus, the Supreme Court has recognized that protecting the public interest against *economic harm* can justify the immediate seizure of property without a prior hearing. *See Fahey v. Mallonee,* 332 U.S. 245, 67 S.Ct. 1552, 91 L.Ed. 2030 (1947) (prehearing deprivation authorized where substantial questions raised regarding the competency of a bank's

management); *Bowles v. Willingham,* 321 U.S. 503, 64 S.Ct. 641, 88 L.Ed. 892 (1944) (setting of price regulations). In such cases, the normal predeprivation opportunity to be heard is pretermitted if the state provides meaningful postdeprivation procedures.

[5] Several factors persuade us that the temporary suspension procedures set out in La. Rev. Stat. Ann. §§ 54:257-258 reflected an appropriate accomodation of the competing interests involved. Thus, the prompt postdeprivation hearing required by section 257 accorded plaintiffs all the process due. The prehearing deprivation authorized by section 257 was based upon a legislative recognition of the need to act quickly in emergency situations to safeguard the economic well-being of farmers. [9] The deprivation authorized by section 257 was only temporary, and, in the instant case, did not require Louisi-

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[9] For a farmer, a grain warehouse functions much like a bank. In emergency situations, a temporary suspension of a warehouse's license may be necessary to prevent depletion of individual farmers' resources kept on deposit with the particular warehouse. Consequently, we note that 7 U.S.C. § 246 governing federally licensed grain warehouses provides that "[p]ending investigation, the Secretary of Agriculture, or his designated representative, whenever he deems necessary, may suspend a license temporarily without hearing." *See also* 7 C.F.R. § 102.9 (1985) (providing for temporary prehearing license suspensions).

La. Rev. Stat. Ann. § 54:241 *et seq.* was repealed in 1983 and replaced by La. Rev. Stat. Ann. §§ 3:3401-3425 (West Supp. 1985). Section 3407 of the new statute continues to authorize temporary prehearing license suspensions and supervision.

ana Rice to cease operations. Moreover, the supervision of Louisiana Rice's operations by the Commission during the temporary suspension appears to have not substantially interfered with those operations. The temporary suspension was authorized only after a preliminary determination of "cause" by the Commission. Finally, to limit the effect of an erroneous Commission determination, section 257 required a prompt postdeprivation hearing within ten days of the suspension.

[6] Given the above procedural safeguards as well as the strong and traditional public interest in permitting temporary prehearing grain warehouse license suspensions, plaintiffs have failed to state a violation of the Due Process Clause of the Fourteenth Amendment. [10] Accordingly, the judgment of the district court is

AFFIRMED.

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[10] Plaintiffs have also alleged a deprivation of liberty without due process based on injury to their business reputations in conjunction with the alleged injury to more tangible property interests. *See In re Selcraig,* 705 F.2d 789, 795 (5th Cir. 1983). Here, however, the postdeprivation procedures accorded plaintiffs by Louisiana law provided all the process due. *Id.* at 796 (due process requires only an opportunity to refute the stigmatizing charge).